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Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Donald P. Davis and Maxine Elaine Davis,

Petitioners,

v.

Sun Oil Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

A. Mark Segreti, Jr.
Counsel of Record
Haffey & Segreti
2365 Lakeview Drive
Suite D
Dayton, OH 45431
(937) 429-8595

Attorney for Petitioners

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QUESTION PRESENTED FOR REVIEW

Whether the usual rules of statutory construction, including the "plain meaning" principle, may be applied in determining whether Congress intended exclusive federal court jurisdiction, in a statute designating the district court where a citizen suit "shall be brought" to abate environmental hazards from disposal of hazardous waste, rather than a presumption of concurrent state and federal court jurisdiction so strong that it is only rebuttable by the express elimination of state court jurisdiction.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

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The opinion of the trial court granting summary judgment is published at 953 F. Supp. 890 (S.D. Ohio 1996). The opinion of the appeals court is published at 148 F.3d 606 (6th Cir. 1998).

JURISDICTION OF THE SUPREME COURT

28 U.S.C. 1254(1) provides for jurisdiction to issue a writ of *certiorari* to the Court of Appeals reviewing its decision and judgment entered on June 24, 1998.

UNITED STATES STATUTORY PROVISION INVOLVED

42 U.S.C. 6972(a)(1)(B), reads as follows:

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --

* * * * * * * * *

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

* * * * * * * * *

Any action brought under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.

* * * * * * * * *

STATEMENT OF THE CASE

This is a citizen action for abatement of hazardous waste contamination found on petitioners' property. Petitioners filed a civil action in state court for common law relief and this parallel federal action under 42 U.S.C. 6972(a)(1)(B)(1984) for injunctive relief and civil penalties. While the federal action was stayed by agreement, the state courts entered judgment requiring respondent, Sun Oil Company, to cleanup the contamination in an expeditious manner. Thereafter, the federal district court granted summary judgment dismissing the federal action, finding it was barred by the doctrine of *res judicata*, because it could have been brought in state court under concurrent state court jurisdiction. The only other courts to address the issue had ruled that the 42 U.S.C. 6972(a)(1)(B) action was within the exclusive original jurisdiction of the federal district courts. The district court followed a 1994 Sixth Circuit ruling requiring an express withdrawal of state court jurisdiction and found that "shall be brought in the district court for the district in which the . . . alleged endangerment may occur", to be ambiguous and "just as readily [could] be interpreted as a specific venue provision and not an express withdrawal of state court jurisdiction."

The Court of Appeals affirmed without any discussion of all the statutory language designating the identity of the court where the citizen abatement action could be brought. Rather, it relied on its 1994 precedent, interpreting this Court to require an express withdrawal of state court jurisdiction, and found that Congress' enactment twelve years earlier did not meet this later judicial test,

and, therefore, there was concurrent state and federal court jurisdiction. It found that the mandatory language "shall be brought in the district court for the district in which the . . . alleged endangerment may occur", "does not affirmatively divest the state courts of their presumptive jurisdiction." 1448 F.3d at 612. It affirmed the trial court.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit decision stands in conflict with the ruling of the Eighth Circuit, as well as a district court decision finding exclusive federal court jurisdiction, relied on for twelve years. *Taylor v. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) and *Middlesex County Bd. Of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 719 (D.N.J. 1986). The Sixth Circuit and the Ohio district court ignored the most fundamental principle of statutory construction, the "plain meaning" of the language used by Congress, in imposing the judicially created presumption. See *Reeves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

42 U.S.C. 6972(a)(1), in mandatory language, states that the created federal action to abate an environmental hazard "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." It specifies a court, not a location. That is plain.

The lower courts ignored the other language in Section 6972 that repeatedly referred to the newly created federal action as being in the United States Court. These provisions are:

(1) Section 6972(a)(2) specifies that actions "be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia." This is a clear designation of exclusively federal courts. No state has a District Court in the District of Columbia.

(2) 42 U.S.C. 6972(b)(1)(B) recognizes that the EPA Administrator or a State may be enforcing hazardous waste laws in federal court or state court, respectively. It is the only reference in Section 6972 to "state" court, demonstrating that Congress knew some government initiated environmental actions could be in state court, but never mentioned such a possibility for a citizen enforcement action.

(3) Subsection (b)(1) provides for intervention of right in an "action under subsection (a)(1)(A) in a court of the United States", referring to the similar citizen suit, again naming the court. Under the Court of Appeals ruling, intervention would be authorized in federal, but not state court actions; an absurd result.

(4) Subsection (b)(2)(E) also provides for intervention in a citizen abatement action, described as being "in a court of the United States". It would be illogical to limit it to federal court, if it could also be brought in a state court.

(5) Subsection (b)(1)(F) repeats the description of the action as "brought under (a)(1)(B) in a court of the United States". A copy must be served on the Attorney General and the EPA Administrator. Under the Court of Appeals ruling, such service would only be required if in federal court, not state court--an illogical result. Only federal courts were intended.

(6) Section 6972(e) provides for the award of costs to the prevailing party and authorizes the court to require "the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." Congress presumably knows the federal rules apply in the federal district courts.

The district court read the designation of the district court as just as likely a specific venue provision. Not only does that conclusion ignore the designation of the district court, but it fails to recognize Section 6972(c), which provides for notice in an action against the EPA Administrator, then states, "Any action respecting a violation under this Act may be brought under this section only in the judicial district in which such alleged violation occurs." This is a "specific venue" provision. It is illogical to conclude that section 6972 has two venue provisions. The district court erroneously viewed subsection (a)(1)(B), which does not refer to the judicial district, but identifies the court where the action must be brought, as a specific venue provision. There is no support for the district court ruling that the (a)(1)(B) language could be for venue.

The Court of Appeals erred in ignoring the plain language selected by Congress in 1976, and focusing on the stricter judicial requirements found in its decision in 1994. *Holmes Fin. Associates v. Resolution Trust Corp.*, 33 F.2d 561 (6th Cir. 1994). It viewed this Court's decision in *Yellow Freight, Inc. v. Donelley*, 494 U.S. 820 (1990), as requiring an express withdrawal of state court jurisdiction, rather than discerning intent from the totality of the statutory language. The Court did not determine congressional

intent. It retroactively imposed its view of the legal standard adopted in 1990, on the 1976 Congress.

In 1976, Congress was adopting another in a line of environmental statutes, "taking a stick to the states", *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and incorporating a citizen suit provision as it had in the earlier statutes. In fact, it made slight modifications to the standard citizen suit section specifically identifying the only courts with jurisdiction. At that time there was no judicial requirement that Congress affirmatively withdraw state court jurisdiction, which the Sixth Circuit now reads as requiring an express withdrawal based on this Court's 1990 rulings.

Furthermore, this Court's *Yellow Freight* and *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) rulings neither require that Congress must expressly withdraw state court jurisdiction nor preclude using the "plain meaning" principle to determine Congressional intent from the descriptions of the court designated to hear the claim. Contrary to the Sixth Circuit's approach, there was no indication that the courts should ignore the "plain meaning" of the statute.

The Sixth Circuit erroneously treated the mandatory designation of the district court in section 6972(a) as synonymous with the Title VII provision interpreted in *Yellow Freight*. *See* 148 F.3d at 612. Section 6972 does not simply confer jurisdiction as does the Title VII provision. It directs in what court the action "shall" be brought. The Sixth Circuit distorts the plain meaning of the sentences in its comparison of the words "shall have" in 42

U.S.C. 2000e-5(f)(3) of Title VII and "shall" in section 6972(a). The Title VII provision states that the district courts "shall have" jurisdiction, conferring jurisdiction, while section 6972(a) states the action "shall be brought in the district court . . . ." The Court of Appeals' dissection of the mandatory words from the context, with the simple conclusion that mandatory words are insufficient, does not do justice to the significant difference in the language chosen by Congress, and, certainly, is contrary to the plain meaning. There is no doubt that Congress designated the district courts as the chosen forum for its citizen enforcement actions.

The Court of Appeals also failed to note that section 6972 does contain a provision that confers jurisdiction, similar to the Title VII provision, except that it confers the remedial jurisdiction on "the" district court. 42 U.S.C. 6972(a), second paragraph.

CONCLUSION

This Court should accept jurisdiction, resolve the conflict between the circuits, and clarify that the courts may use the usual rules of statutory construction, including applying the plain meaning of the language used by Congress, to determine whether it intended for an action to be brought exclusively in federal court. It should reverse the court of appeals and also find that the language used by Congress in the 1976 enactment of a special citizen suit action in the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6972(a)(1)(B), for a citizen to obtain

abatement of an environmental hazard from disposal of hazardous waste, which names the district court in which the action "shall be brought", adequately demonstrates that it intended exclusive federal court jurisdiction.

Respectfully submitted,

A. Mark Segreti, Jr.
(0009106)
Trial Attorney
HAFFEY & SEGRETI
2365 Lakeview Drive, Ste.D
Dayton, OH 45431
(937) 429-8595;fax-429-8590
Attorney for Petitioner

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD P. DAVIS and
MAXINE ELAINE DAVIS,
Plaintiffs-Appellants,

No. 96-4077

v.

SUN OIL COMPANY,
Defendant-Appellee.

Appeal from the United State District Court
for the Southern District of Ohio at Dayton
No. 93-00408--Walter H. Rice,
Chief District Judge

Argued: August 1, 1997

Decided and Filed: June 24, 1998

Before: MERITT, WELLFORD, and BOGGS, Circuit Judges

COUNSEL

ARGUED: A. Mark Segreti, Jr., HAFFEY & SEGRETI, Dayton, Ohio, for Appellants. Michael R. Blumenthal, McMAHON, DeGULIS & HOFFMAN, Cleveland, Ohio, for Appellee.

ON BRIEF: A. Mark Segreti, Jr., HAFFEY & SEGRETI, Dayton, Ohio, for Appellants. Michael R. Blumenthal, David S. Hoffmann, McMAHON, DeGULIS & HOFFMANN, Cleveland, Ohio, for Appellee.

The court delivered a PER CURIAM opinion. BOGGS, J. (pp. 14-19), delivered a separate opinion concurring in part and dissenting in part.

OPINION

PER CURIAM. Donald and Maxine Davis brought this action under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), against Sun Oil Co. ("Sun"). In *Davis v. Sun Oil Co.*, 929 F. Supp. 1077 (S.D. Ohio 1996)("Davis I"), the district court denied the Davises' motion for summary judgment, and in *Davis v. Sun Oil Co.*, 953 F. Supp. 890 (S.D. Ohio 1996)("Davis II"), it granted Sun's motion for summary judgment. We **AFFIRM.**

I

The facts of this case may be found in detail in *Davis v. Sun Refining and Marketing Co.*, 671 N.E.2d 1049 (Ohio App. 1966), of which we take judicial notice. To summarize the situation, in 1985 the Davises purchased from Sun a parcel of land on which Sun had operated a Sunoco filling station. Prior to the sale, Sun told the Davises that it was removing the four 6,000 gallon underground gasoline storage tanks on the property, and did so. In 1989, the Davises contracted to sell the land to United Dairy Farmers ("UDF"), subject to an environmental inspection. When UDF's consultants tested the land, they discovered quantities of gasoline in the soil, emanating from buried gasoline pipes that had connected the tanks and the gas pumps; Sun had left the piping in place and covered it up with dirt when the tanks were removed. Faced with the prospect of a lawsuit, Sun executed with the Davises a letter agreement pledging to clean up the site.

After Sun largely failed to do so, the Davises sued Sun in state court in May 1991, alleging nuisance, breach of contract, and fraud.[1] In September of 1993, a referee conducted a three-day trial, and in December of 1993, filed a report with the court recommending that Sun be found to be in breach contract, and that the Davises be awarded damages equal to what they had already spent in an effort to clean up the site, and specific performance of the letter agreement. The referee also recommended that Sun be found liable for fraud, and that the Davises be awarded punitive damages. In March of 1995, the state court issued a decision and entry adopting the referee's recommendations. As to the specific performance remedy, the court required Sun to clean up the site so as to satisfy state regulatory guidelines within one year, and to post a $400,000 bond as guarantee. In January, 1996, the state court of appeals affirmed the decision of the trial court, except that it modified the specific performance award, on the grounds that cleaning up the site so as to meet state regulations might take more than one year. The appellate court ordered Sun "to complete the cleanup in an expedited manner, in full accordance with all requirements and regulations promulgated by the fire marshall [sic][the state agent charged with regulating underground storage tanks]." *Davis*, 671 N.E.2d 1049.

Meanwhile, in October of 1993, the Davises brought this RCRA action in federal district court, alleging that Sun, by leaving gasoline buried in the property, had"contributed to and caused the disposal of solid or hazardous waste on the property which may present an imminent and

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[1] The complaint in state court originally included a claim for violations of federal law, which were eliminated in an amended complaint. No specific statutory basis was stated for the federal allegations, and we do not know why the Davises dropped them from the lawsuit.

substantial endangerment to health or environment," in violation of RCRA, 42 U.S.C. § 6972(a)(1)(B). The court held a pretrial conference and, in July of 1994, issued the first of a series of orders staying proceedings pending the resolution of the litigation in state court, and requesting timely status reports with respect to the other action pending.

II

In July, 1995, the Davises moved for summary judgment. They argued that

> the essential factual elements of a claim under 42 U.S.C.§ 6972 have been finally determined by the Court of Common Pleas of Cuyahoga County, Ohio . . . [which] specifically found that the contamination indicated "high levels of benzene, toluene, ethyl benzene and xylenes (together called "BTEX"), lead and PHC. The PHC levels exceeded the State's guidelines." . . . The several findings of high levels of benzene necessarily determines that there may be an imminent and substantial endangerment. *See* 40 C.F.R. §§ 141.32 and 141.50(a). thus, through the principles of *collateral estoppel,* Defendant Sun is now estopped from contesting the findings of the Court of Common Pleas. . . . Under Ohio law, those issues are determined and are entitled to preclusive effect. 28 U.S.C. § 1738 requires that the Court give them the same preclusive effect. *Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S. 373 (1985); *Migra v. Warren City School Bd.,* 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481-82 (1982).

The district court rejected the Davises' argument, correctly observing that the precise issue of whether the contamination "may present an imminent and substantial endangerment to health or the environment" had never been actually litigated and determined by the state court. Therefore, the

issue was not precluded from further litigation. 929 F.Supp. at 1081.[2]

Further, the court held that summary judgment was inappropriate because there was a genuine issue of material fact as to whether the contamination "may present an imminent and substantial endangerment." The Davises and Sun each presented affidavits by consulting engineers, who, after evaluating the same environmental assessment that had been submitted as evidence in state court reached--unsurprisingly--opposite conclusions on this question. As the court observed, "[t]his disagreement by the experts retained by each of the parties, would appear to create a genuine issue of material fact as to the ultimate legal issue in this case." *Id.* at 1082.

The court also rejected the Davises' attempted use of the Environmental Protection Agency regulations cited in their brief to establish a standard for the level of contamination that might, as a matter of law, "present an imminent and substantial danger." The district court noted that the cited EPA regulations pertain to contamination levels in drinking water, not in soil, and observed:

> There is simply no evidence as to either the precise quantity of gasoline which remains in the soil; whether this seepage either currently has an effect on the drinking water, or is likely to have such an effect; or what the

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Although the judgment of the Ohio court did not settle as a matter of law the issue of RCRA liability, we hold that other facts and issues actually and necessarily litigated and determined by the Ohio court are precluded from relitigation, in accordance with Ohio's law of issue preclusion. *See Whitehead v. General Tel. Co.*, 254 N.E.2d 10,13 (Ohio 1969); *overruled in part by Grava v. Parkman Township*, 653 N.E.2d 226, 229(1995); *see also Hapgood v. City of Warren*, 127 F.3d 496 (1997).

> magnitude of such an effect might be, in regard to health or the environment. Although this Court could speculate on these issues, such speculation would not provide a proper basis for summary judgment.

RCRA is a remedial measure that courts have tended to construe and apply in a liberal, though not unbridled, manner. The Second Circuit has discussed the statute as follows:

> When congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." RCRA's waste management requirements for disposal facilities are designed not only to prevent, but also to mitigate endangerments to the public health and the environment.
>
> Significantly, congress used the word "may" to preface the standard of liability: "present an imminent and substantial endangerment to health or the environment." This is "expansive language", which is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any* risk posed by toxic wastes."
>
> The statute is "basically a prospective act designed to prevent improper disposal of hazardous wastes in the future." It is not specifically limited to emergency-type situations. A finding of "immanency" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: "An imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." Imminenence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose."

In addition, a finding that an activity may present an imminent and substantial endangerment does not require actual harm. Courts have

consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm.

Dague v. City of Burlington, 935 F.2d 1343, 1355-56 (2d Cir. 1991)(citations omitted).[3]

In keeping with the language recited in *Dague*, courts might in some cases be justified in holding, as a matter of law, that a certain degree of hazardous waste at a particular site "may present an imminent and substantial endangerment." They could do so where the specific circumstances of the disposal site presented such large and unmitigated hazards (such as the amount and type of waste, combined with its proximity to the public) that "reasonable minds could not differ as to the import of the evidence." *See Anderson v. Liberty Lobby*, 477 U.S. 242,250 (1986). The district court cited, and correctly distinguished, two such cases, in which the particular facts had been held to justify summary judgment. *Davis II*, 953 F.Supp. at 1083 n.3. We agree with the district court's explanation, noted above, of why the determination by the Ohio court that Sun had polluted the soil in that manner and degree shown by the submitted evidence was not by itself adequate to settle as a

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In *Meghrig v. KFC Western, Inc.*, 116 S.Ct. 1251 (1996), the Supreme Court stated that, under § 6972(a)(1), "[a]n endangerment can only be imminent if it threatens to occur immediately." *Id.* at 1255 (internal quotations and citation to dictionary definitions of "imminent" omitted). The Court made this observation in support of its holding that the citizen suit provision of RCRA did not afford as a remedy the costs of a clean-up undertaken prior to the filing of the lawsuit; once a site is cleaned up, it can no longer present the threat that is a predicate for the action. It is not clear whether the Court intended to refute the reading of "imminence" contained in cases such as *Dague*: a looming threat of harm, but not necessarily a looming harm.

matter of law the question of whether the pollution "may present an imminent and substantial endangerment." Accordingly, we affirm the district court's denied of the Davises' motion for summary judgment.

III

The district court next addressed Sun's claim that the doctrine of *res judicata* prevents the Davises from maintaining this federal action. In its cross-motion for summary judgment, Sun argued that "Plaintiffs have obtained the only relief they are entitled to under 42 U.S.C.§ 6972 by the decision and order in plaintiffs' parallel state cause of action. By the application of the common law doctrine of *res judicata*, plaintiffs cannot maintain the present action having obtained the same relief in state court."[4]

It would be possible to reformulate Sun's theory as a challenge to the Davises' standing to bring their RCRA action--specifically, as an assertion that the Davises fail to meet the "remedial benefit" requirement of standing. *See Worth v. Seldin*, 422 U.S. 490,508 (1975)(plaintiff lacked standing to challenge city's zoning ordinance where unable to show that "he personally would benefit in a tangible way from the court's intervention"); *Linda R.S. v. Richard D.*, 410 U.S. 614,618 (1973)(mother had no standing in suit to compel prosecution of father for failure to pay child support where successful action "would result only in the jailing of the child's father. The prospect that prosecution will . . result in payment of support can, at best, be termed only speculative.") *See generally* 13 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3531.6. Sun may not prevail on such a theory, however, because the Davises may benefit from the pressure placed on Sun to remedy the pollution by the daily-accruing penalties.

Alternatively, Sun's argument could be viewed as expressing the facet of the mootness doctrine under which it may be held that "[i]f full relief is accorded by another tribunal, a proceeding seeking

Were the Davises to win the RCRA suit, Sun argued, they would be entitled to nothing more than an order requiring Sun to take "necessary action," i.e., to investigate the site, to remediate the site, etc. Sun claims that the Davises have, in fact, already obtained an order from the state court requiring Sun "to clean up the contamination on the property." In an attempt to demonstrate that the Davises had already obtained all the relief they could get, Sun argued (correctly, in light of *Meghrig v. KFC Western, Inc.*, 116 S.Ct. 1251(1996), *see* n.3 *supra*) that the Davises would not be entitled under RCRA to compensation for the costs they had incurred in their partial efforts to clean up the site. Sun also argued that the Davises could not seek imposition of the civil penalties available under §6928(g), which provides:

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

Initially, the district court rejected Sun's argument that the Davises could not enforce the civil penalty provision as a private party. Indeed, civil penalties payable to the United States may be awarded in a citizen suit brought under §6972(a). *See Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 128 (N.D.Ill.1994); *cf. Middlesex County Sewerage Auth v. Sea Clammers Ass'n.*, 453 U.S. 1, 14 n.25 (1981)(recognizing availability of civil penalties in suits brought under 33 U.S.C. §1365(a), the citizen-suit provision of the Federal Water Pollution Control Amendment of 1972).

The district court then noted Sun's argument that

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the same relief is moot. . ." *See* 13A Wright & Miller §3533.2 & n.28(citing cases). Where substantial civil penalties might be assessed against Sun, the case is clearly not moot.

the Davises could not maintain the federal action under the doctrine of *res judicata*, because they had obtained in state court all the relief the district court could have given them in the federal litigation. The court declined to address that claim specifically, however, because it found that even if the Davises had not obtained all such relief in state court, Ohio's laws on claim preclusion prevented the Davises from maintaining the federal action.

The district court relied on *Stuhlreyer v. Armco, Inc.*, 12 F.3d 75(6th Cir.1993), as an accurate statement of Ohio's law on claim preclusion:

> State judicial proceedings are entitled to the same preclusive effect in federal court as they would receive in the judgment-rendering state ... In Ohio, "[t]he doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."' ... This includes all claims which were or might have been litigated in the first lawsuit ... Thus, under Ohio law, claim preclusion requires that the rendering court possess subject matter jurisdiction over the original claim.

Stuhlreyer, 12 F.3d at 77(citations omitted); *see Grava v. Parkman Township*, 653 N.E.2d 10,13(Ohio 1969)(holding that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.") In accordance with this rule against "claim-splitting," the district court turned to the question of whether the RCRA suit "might have been litigated" in the state court proceedings or whether, instead, the federal courts enjoyed exclusive jurisdiction over such matters.

The district court recognized that *Tafflin v. Levitt*, 439 U.S. 455(1990), and *Yellow Freight*

System, Inc. v. Donnelly, 494 U.S. 820(1990), are important in resolving the question of whether federal jurisdiction is exclusive in citizen suits brought under the RCRA. These two cases require that Congress either expressly state that federal jurisdiction is exclusive or in some other affirmative way overcomes the strong presumption that jurisdiction is concurrent with state courts. This doctrine is an integral part of our system of federalism. The federal courts cannot create Congressional intent, if it is left unstated, by making an assumption that federal jurisdiction should be exclusive. Rather, the strong presumption is in favor of concurrent jurisdiction in the state court. *See Holmes Fin. Assocs. v. Resolution Trust Corp.*, 33 F.3d 561,565 (6th Cir.1994)(holding that Congress must "affirmatively divest" the state courts of their "presumptive competence" to hear cases arising under federal law).

In the instant case, we find that the citizen suit provision of the RCRA does not expressly provide for exclusive jurisdiction.[5] As in the legislation scrutinized in *Tafflin* and *Yellow Freight*, Congress did not specifically deal with the question. We disagree with the analysis in *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715 (D.N.J. 1986), in which the district court held that the enforcement provision of the RCRA creates exclusive jurisdiction in the federal courts. That provision provides that RCRA private suits "*shall be brought* in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." 42 U.S.C.§6972 (emphasis added). The *Middlesex* court found that the term "shall" was mandatory, not discretionary. The court also found that the legislative history of the RCRA indicated that "Congress did not contemplate that

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The Davises do not argue that the statutory scheme of the RCRA would plainly be disrupted by the exercise of state-court jurisdiction. *See Holmes*, 33 F.3d at 569.

RCRA suits would be brought in State courts." *Id.* at 719. We disagree with that reasoning. In our view, the term "shall" as it is used in the statute does not affirmatively divest the state courts of their presumptive jurisdiction. In *Yellow Freight,* the Supreme Court rejected a similar argument made with respect to a provision in Title VII which states that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States *shall have jurisdiction* under this subchapter." *Yellow Freight,* 494 U.S. at 823(quoting 42 U.S.C. §2000e-5(f)(3)(emphasis added.) The "shall have" language in that statute was not deemed to be sufficient evidence that Congress intended to divest the state courts of jurisdiction over those matters. In the same way, the "shall" language in the RCRA enforcement provision does not grant exclusive jurisdiction to the federal courts in suits brought pursuant thereto.

The dissent is of the view that, even if jurisdiction is concurrent, Sun may not rely on a *res judicata* defense because it acquiesced in the claim-splitting. We disagree. Sun gave notice to the plaintiffs that it would rely on the defense of res judicata in its answer, which specifically states that Sun is relying upon the doctrine of *res judicata* as a defense. The district court relied upon that pleading and held the doctrine of *res judicata* applicable as a defense, and the court did not err in holding that the doctrine applies. Therefore, the proper application of the doctrine precludes this action in federal court. We conclude, moreover, that the defense was not waived in the district court. Having stated in its answer that "Plaintiffs' claims are barred by the doctrine of res judicata," defendant may rely on this defense and we find no error in the district court's determination.

We join with the dissent that ¶26 of the RESTATEMENT OF JUDGMENTS adopted in *Grava v. Parkman Township,* 653 N.E.2d 226,229 (Ohio 1995), precludes claim-splitting except where "the parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced

therein." Sun did not agree to plaintiff's claim-splitting, and we cannot agree with the dissent that it acquiesced in this respect. Sun defended on the doctrines of both waiver and *res judicata*. We do not construe *Matter of Super Van, Inc.*, 92 F.3d 366 (3d Cir.1996), to support plaintiff's position in this case. *Super Van* defendants did not plead *res judicata*, and defendants indicated to the bankruptcy court that they "preferred not to have the two action [one in state court and one in federal court] consolidated." *Id.* at 371. By reason of this action, contrary to defendant's posture in the instant case, defendants were deemed to have acquiesced in the plaintiff's claim-splitting. We believe, therefore, contrary to the dissent, that plaintiffs were not treated unjustly and that they had fair notice of the defendant's claim of *res judicata*.

We are mindful, as the dissent points out, that the defense of *res judicata* can mean several things. The district court relied on the "other action pending" facet of the *res judicata* doctrine in finding that this federal suit was barred. It is unfortunate that the district court did not earlier rule on the issue, at a time when the Davises could have had the opportunity to amend their state-court action to add the RCRA suit if they so desired. But we are of the view that Sun properly asserted the defense in its answer, and that the district court was warranted in addressing all aspects of the *res judicata* claim.

Accordingly, we **AFFIRM** the denial of the plaintiffs' motion for summary judgment and the granting of defendant's motion, and entry of judgment for the defendant.

CONCURRING IN PART, DISSENTING IN PART

BOGGS, Circuit Judge, concurring in part and dissenting in part. I concur in parts I and II of the court's opinion of this case. I dissent from the holding in part III that Sun Oil's general invocation of "res judicata" in its amended answer suffices to overcome Sun's acquiescence in the maintenance by Davis of concurrent actions in state

court and federal court.

Section 24 of the Restatement of Judgments (2d) (1982), which articulates the rule against claim-splitting, provides that it is subject to the exceptions described in §26. Consequently, when the Ohio Supreme Court "expressly adhere[d] to the modern application of the doctrine of *res judicata*" found in §§24-25, *see Grava v. Parkman Township*, 653 N.E.2d 226,229(Ohio 1995), it also adopted §26 of the Restatement, which provides, in pertinent part:

> EXCEPTIONS TO THE GENERAL RULE CONCERNING SPLITTING
>
> (1) When any of the following circumstances exists, the general rule of §24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein . . . .

The accompanying comment states in part:

> A main purpose of the general rule stated in §24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim ... Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Sun filed an amended answer to the Davises' RCRA suit on March 22, 1994, asserting, among other defenses, that "Plaintiff's claims are barred by the

doctrine of waiver," and "Plaintiff's claims are barred by the doctrine of res judicata." The question arises whether this was an objection, or a sufficient one, to the Davises' claim-splitting. I conclude that it was not, and that Sun thereby in effect acquiesced in the bringing of the federal action. *See, e.g., In re Super Van, Inc.*, 92 F.3d 366,371 (5th Cir. 1996); *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321,328 (9th Cir. 1995); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072-73 (3d Cir.1990); *Calderon Rosado v. General Elec. Circuit Breakers, Inc.*, 805 F.2d 1085,1085 (1st Cir. 1986).

Conceivably the mention of waiver suggests that the Davises waived their opportunity to bring the RCRA claim in state court, but that is a speculation never borne out in Sun's briefs below. As for the defense of res judicata, it is true that claim-splitting falls under that broad heading. But Sun's brief below suggests that by claiming this defense, it was not complaining of claim-splitting, but was advancing its theory of full remedies discussed above at 8-10.[6]

I note, too, the boiler-plate nature of Sun's amended answer. Here it is useful to look to the rules pertaining to the pleading of affirmative defenses. I recognize, of course, that FED R.CIV.P 8(e) provides that "[n]o technical forms of pleadings or motions are required." But requiring an affirmative defense to be stated in an intelligible manner is not a mere formalism. While the rule against splitting claims is essential to the repose

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This court has had occasion to comment on the confusion caused by the use of the broad term "res judicata," and to "express our hope that future litigants, in the interests of precision and clarity, will formulate arguments which refer solely to issue or claim preclusion and which refrain from using the predecessors of those terms, whole meanings have become so convoluted." *Barnes v. McDowell*, 848 F.2d 725,728 n.5(6th Cir. 1988).

to which defendants are ultimately entitled, it must be applied fairly to plaintiffs, as well. An essential aspect of that fairness is adequate notice of the nature of the affirmative defense. "Res judicata and collateral estoppel are affirmative defenses that must be pleaded ... The purpose of such pleadings is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate." *Blonder-Tongue Labs, Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971). "An affirmative defense may be pleaded in general terms and will be held to be sufficient, and therefore invulnerable to a motion to strike, *as long as it gives plaintiff fair notice of the nature of the defense.*" 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE AND PROCEDURE §1274 (emphasis added). "Rule 8(c), by requiring defendant to plead his defense or risk waiving it, also served the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be barred completely." *Id.* at §1270. "Another highly relevant consideration [as to whether a theory must be pleaded as an affirmative defense] is whether plaintiff will be taken by surprise by the assertion at trial of a defense not pleaded affirmatively by the defendant." *Id.* at §1271. "The requirement that affirmative defenses be specifically pleaded is based on notions of fair play. A party should not have to deal with an extraneous issue in a lawsuit unless it is specifically brought to his attention ... More important, what matters is not whether the magic words 'affirmative defense' appears in pleadings, but whether the Court and the parties were aware of the issues involved." *Baker v. City of Detroit*, 483 F.Supp. 919,921 (E.D.Mich.1979), *aff'd on other grounds sub nom. Bratton v. City of Detroit*, 704 F.2d 878, *vacated on rehearing*, 712 F.2d 222 (6th Cir. 1983).

In short, I do not think that Sun's cloudy answer sufficed--if such was its intent at all--to put the Davises on fair notice that Sun objected to the Davises' maintenance of separate state and federal actions. A useful comparison can be found in

Diversified Foods, Inc. v. First Nat'l Bank of Boston, 985 F.2d 27,29 (1st Cir.1993), where, in answering the complaint in the successive federal suit, the defendants "included as a defense the assertion that the borrowers 'have improperly split their causes of action, having previously filed in another court another complaint arising out of the same transaction or series of transactions.'" The court held that defendants who had presented such a plain objection could hardly be found to have acquiesced in the split claim.

The prejudice to the Davises is obvious. If they had perceived such an objection, then they could have repaired to state court before the entry of judgment, seeking to amend their complaint to include a RCRA count. Or they could have asked the district court to strike the defense, and mustered arguments at that time in favor of exclusive federal jurisdiction.

The difficulty for the Davises was compounded by the fact that no court, so far as I can tell, had ever held that RCRA cases could be brought in state court, and that numerous courts had either held or assumed that jurisdiction was exclusively federal.[7]

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[7] *See Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715,719 (D.n.J.1986); *Jilot v. Colorado*, No. 95CA1719, 1996 WL 714482, at *2 (Colo. App. Dec. 12, 1996)(unpublished pending appeal). A number of other courts have stated or assumed that RCRA jurisdiction is exclusively federal. Together, the effect of these cases is an emphatic consensus that RCRA jurisdiction is exclusively federal. yet none of the cases apply with full rigor the analytic framework erected by the Supreme Court in the line of cases beginning with *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473(1981) and culminating in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820(1990).

The Eighth Circuit has flatly stated that "RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to section 6972(a)(1)... ."

Nor do we find any report of RCRA citizen action ever being brought in an Ohio court. The district court's holding on this matter is at least plausible, but I cannot say that resolution of that question is sufficiently plain under *Yellow Freight* and *Holmes* to have put the Davises fairly on notice that they could bring the RCRA allegation in Ohio court. *See Diversified Foods*, 985 F.2d at 31 (recognizing that a good-faith belief in exclusive federal jurisdiction might excuse a failure to bring a federal claim as part of a previous state-court action, but rejecting that excuse where the belief in exclusive federal jurisdiction was "formed in the face of two circuit decisions to the contrary.") Indeed, if the district court held strong views on this matter, it might have alerted the parties, or perhaps have asked them to brief the issue. As it was, for the year and a half prior to the state court judgment, the Davises' federal and state claims were pending simultaneously. The district court requested and received periodic status reports. It was reasonable for the Davises to believe that, once the state court proceeding was

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Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094, 1098 (8th Cir. 1988). thus, it was not necessary, or even possible, to exhaust certain tribal remedies, as normally required. True, *Blue Legs* preceded by two years the stringent language of *Yellow Freight* noted by this court in *Holmes*. Nonetheless, since *Yellow Freight*, *Blue Legs* has repeatedly been cited as good law--though, again, generally without much jurisdictional analysis under *Yellow Freight*. See, e.g., *Fletcher v. United States*, 116 F.3d 1315,1327 (10th Cir.1997); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498,1502 (10th Cir. 1997); *Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir.1996). Other courts have without citing *Blue Legs*, reached the same conclusion. *See White & Brewer Trucking, Inc. v. Donley*, 952 F.Supp. 1306 (C.D.Ill.1997)(*Burford* abstention inappropriate when federal action in which abstention is sought contains RCRA claims, over which federal courts have exclusive jurisdiction.)

over, they could proceed with their RCRA complaint in federal court. The record shows (and Sun confirmed at oral argument), that, other than the vague statements in its amended answer, Sun never voiced an objection to the Davises' splitting of the claims.

Thus, I would hold that the Davises' RCRA suit was not barred by the application of Ohio's rule against claim-splitting, and may proceed. I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Donald P. Davis and Maxine Elaine Davis,	:	Filed: U.S. Court of Appeals
	:	June 24, 1998
Plaintiffs-Appellants,	:	No. 96-4077
v.	:	
Sun Oil Company,		JUDGMENT ENTRY
Defendant-Appellee.	:	

For the reasons stated in the opinion entered on this 24th day of June, 1998, the district court judgment is affirmed.

Leonard Green,
Clerk of Courts

By/s/_____
Deputy Clerk

DONALD DAVIS, et al., Plaintiffs,
vs.
SUN OIL COMPANY, Defendant.

Case No. C-3-93-408
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
953 F. Supp. 890, 1996 U.S. Dist. LEXIS 21120
August 27, 1996, FILED

COUNSEL

For DONALD P. DAVIS, MAXINE ELAINE DAVIS, plaintiffs; Joseph Philip Moore, Sunderland & Moore-3, Vandalia, OH. Albert Mark Segreti, Jr., Haffey & Segreti, Dayton, OH.

For SUN OIL COMPANY aka Sun Refining and Marketing Company, defendant; Michael Robert Blumenthal, David S. Hoffmann, McMahon, DeGutis & Hoffmann, Cleveland, OH.

JUDGES

WALTER HERBERT RICE, UNITED STATES DISTRICT COURT
AUTHOR: RICE

OPINION

DECISION AN ENTRY OVERRULING IN PART AND SUSTAINING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. #26); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFFS; TERMINATION ENTRY.

In 1985, the Plaintiffs purchased a parcel of real estate located in Montgomery County, Ohio, on which the Defendant, a previous owner of that property, had operated a gas station. Defendant had removed the gasoline storage tanks before it sold the

property; however, it did not remove the pipes through which gasoline would flow from those tanks to the pumps. Plaintiffs bring this action under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1). In their Complaint, the Plaintiffs allege that "Defendant, while the owner of the property, handled hazardous substances on that property, and contributed to and caused the disposal of solid or hazardous waste on the property which may present an imminent and substantial endangerment to health or the environment, **i.e.**, gasoline components, including benzene, toluene, ethylbenzene and xylenes." Doc.#1 at P 5. The Plaintiffs request that the Court "order the defendant to take such actions as are necessary to remedy the situation caused on the property, impose appropriate civil penalties under 42 U.S.C.§ 6928(g), and award plaintiffs their reasonable attorney and expert witness fees." **Id.** at 2-3.

This case is now before the Court on the Defendant''s Motion for Summary Judgment (Doc.#26). As a means of analysis, the Court will initially set forth the standards which govern all motions for summary judgment, following which it will turn to the instant motion.

A motion for summary judgment "should be granted where the evidence is such that it 'would require a directed verdict [now a judgment as a matter of law] for the moving party.'" **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 251, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986), quoting **Sartor v. Arkansas Gas Corp.**, 321 U.S. 620, 624, 88 L. Ed. 967, 64 S. Ct. 724 (1944). Summary judgment must be entered "against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." **Celotex Corp. v. Catrett**, 477 U.S. 317, 322, 91 L. Ed.2d 265, 106 S.Ct. 2548 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. **See also Boretti v. Wiscomb**, 930 F.2d 1150, 1156 (6th Cir. 1991)(The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial." quoting **Gutierrez v. Lynch**, 826 F.2d 1534, 1536 [6th Cir. 1987]). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." **Anderson**, 477 U.S. at 250 (quoting Fed. R.Civ.P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." **Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574, 586, 89 L. Ed.2d 538, 106 S.Ct. 1348 (1986). **See also, Michigan Protection and**

Advocacy Service, Inc. v. Babin, 18 F.3d 337, 341 (6th Cir. 1994)("The Plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff.") Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. **Celotex Corp.**, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all **reasonable** inferences in the favor of that party. **Anderson**, 477 U.S. at 255 (emphasis added). Of course, if the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, **Federal Practice and Procedure**, §2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." **Interroyal Corp. v. Sponseller**, 889 F.2d 108, 111 (6th Cir. 1989), **cert. denied**, 494 U.S. 1091 (1990). **See also, L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.**, 9 F.3d 561 (7th Cir. 1993); **Skotak v. Tenneco Resins, Inc.**, 953 F.2d 909, 915 n.7 (5th Cir.),

cert. denied, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992)("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment . . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

The Defendant initially argues that the Plaintiffs are not entitled to two types of relief which it claims they are seeking, to-wit: 1) restitution for sums which they expended attempting to clean up the property, hiring expert witnesses and conducting an environmental investigation, and 2) civil penalties, given that the only relief the Plaintiffs can obtain under RCRA is an order requiring it to take certain action. **See** Doc.#26 at 4-5. The Court will address these two forms of relief in the above order.

In their Complaint (Doc.#1), the Plaintiffs did not request that the Court order restitution for any past costs they have incurred. However, in their Motion for Summary Judgment,[1] the Plaintiffs did request that the Court enter summary judgment in their favor and enter appropriate equitable relief, including ordering the Defendant "to provide restitution to the Plaintiffs for monies spent by Plaintiffs in attempting to clean up the property, hiring expert witnesses, and incurring costs of environmental investigation." Doc.#21 at 11. The Court need not rule upon the merits of this aspect of the Defendant's Motion for Summary Judgment

(Doc.#26). Under Rule 8(a)(3) of the Federal Rules of Civil Procedure, the type of relief sought must be contained in the pleading, in this case, the Complaint. No provision of those Rules or any case law extant authorizes a person to request a form of relief in a motion for summary judgment, different from that requested in his pleading. Moreover, the Plaintiffs have not sought leave to amend their Complaint to request the remedy of restitution.[2] In sum, since the Plaintiffs' Complaint did not pray for restitution as a form of relief, they are not entitled to an order granting same. Nor is the Defendant entitled to a ruling addressing the merits of said non-existent claim. Therefore, since a live controversy regarding Plaintiffs' entitlement to an order of restitution does not exist, this Court overrules, without addressing the merits of the parties' arguments, the Defendant's Motion for Summary Judgment (Doc.#26), to the extent that, with said motion, Defendant seeks summary judgment on the Plaintiffs' "request" for such an order.

The Defendant also argues that it is entitled to summary judgment on the Plaintiffs' request that the Court impose a civil penalty upon Defendant.[3] The Defendant argues that this Court cannot impose civil penalties in an action brought by a private party. Defendant's argument is predicated upon 42 U.S.C.§ 6928(g), which authorizes the imposition of civil penalties. Section 6928(g) provides:

> (g) Civil penalty
>
> Any person who violates any requirement of this subchapter [§§ 6921-6939e] shall be liable to the United States for a civil penalty in an amount

> not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

The Defendant argues that a private party cannot enforce the civil penalty provision, since § 6928(g) renders a violator liable to the United States. This Court does not agree. The citizen suit provision of RCRA explicitly grants District Courts the jurisdiction "to apply any appropriate civil penalties under section 6928(a) and (g) of this title." 42 U.S.C. § 6972(a). Courts which have considered the question have concluded that said citizen suit provision, § 6972(a), permits the imposition of a civil penalty in an action brought by a private party. **See Clorox Co. v. Chromium Corp.**, 158 F.R.D. 120, 128 (N.D. Ill. 1994). **See also, Department of Energy v. Ohio**, 503 U.S. 607, 118 L.Ed.2d 255, 112 S.Ct. 1627 (1992)(assuming that § 6972(a) invests a District Court with jurisdiction to impose civil penalties in an action brought by a private party). Moreover, RCRA's citizen suit provision is strikingly similar to the citizen suit provision in the Clean Water Act ("CWA"). **Compare** 42 U.S.C.§ 6972(a) (RCRA) with 33 U.S.C. § 6972(a) (RCRA) with 33 U.S.C. § 1365(a) (CWA). **See also, Garcia v. Cecos International, Inc.**, 761 F.2d 76, 81 (1st Cir. 1985)(noting similarity of citizen suit provisions in those two statutes). In **Middlesex County Sewerage Auth. v. Sea Clammers Association**, 453 U.S. 1, 14 n. 25, 69 L.Ed2d 435, 101 S.Ct. 2615 (1981), the Supreme Court said that a District Court could impose civil penalties in a citizen suit under the CWA. **See also, Gwaltney v. Chesapeake Bay Foundation**, 484 U.S. 49, 98 L.Ed.2d 306, 108 S.Ct. 376 (1987). Accordingly, this Court concludes that

civil penalties can be imposed upon the Defendant in this lawsuit and overrules the Defendant's Motion for Summary Judgment (Doc.#26), to the extent that with same Defendant seeks summary judgment on Plaintiffs' request that the Court impose civil penalties on the Defendant.

Alternatively, the Defendant argues that **res judicata** prevents the Plaintiffs from maintaining this action. In support of that argument, the Defendant relies upon the parallel litigation between the same parties which had been proceeding in the courts of Ohio, under a theory of nuisance, fraud and breach of contract. In that litigation, the Montgomery County Court of Common Pleas entered final judgment in favor of the Plaintiffs (who are also the Plaintiffs in this litigation), on the Plaintiffs' fraud and breach of contract claims, awarding monetary damages, attorney's fees and a decree of specific performance ordering Defendant to clean up the property within one year of the judgment. The Defendant (who, likewise, is the Defendant in this litigation) appealed that judgment to the Montgomery County Court of Appeals. On January 31, 1996, that court rendered its decision, affirming, with a slight modification,[4] the judgment of the trial court. **Davis v. Sun Oil Company**, 1996 WL 38927 (Ohio App. 1996). As a result of the Appellate Court's decision, the Plaintiffs obtained, in state court, all of the relief this Court could conceivably grant to **them** in this litigation.[5]

Of course, even if the Plaintiffs had not obtained all such relief in state court that they could achieve herein, the doctrine of **res judicata**, if applicable, would bar this litigation. In **Stuhlreyer v. Armco, Inc.**, 12

F.3d 75, 77 (6th Cir. 1993), the Sixth Circuit reviewed the principles which a District Court must apply when deciding whether to give **res judicata** effect to a prior state court judgment:

> State judicial proceedings are entitled to the same preclusive effect in federal court as they would receive in the judgment-rendering state. 28 U.S.C. § 1738; **Marrese v. American Academy of Orthopaedic Surgeons**, 470 U.S. 373, 384, 84 L.Ed.2d 274, 105 S.Ct. 1327 (1985). We therefore look to Ohio preclusion law. **Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.**, 918 F.2d 658, 663 (6th Cir. 1990). In Ohio, "the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." **Gargallo**, 918 F.2d at 661 (quoting **Norwood v. McDonald**, 142 Ohio St. 299, 305, 52 N.E.2d 67, 71 (1943)(other citations omitted)). **National Amusements, Inc. v. Springdale**, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990), **cert. denied**, 498 U.S. 1120, 112 L.Ed.2d 1180, 111 S.Ct. 1075 (1991). Thus, under Ohio law, claim preclusion requires that the rendering court possess subject matter jurisdiction over the original claim. **Gargallo**, 918 F.2d at 663.

It is not questioned that the parties in this action are the same as those in the state court litigation. In addition, a final judgment has been entered by the Montgomery County Court of Common Pleas, which was affirmed, with one minor modification, by the Montgomery County Court of Appeals. Accordingly, in this case, this Court need only focus on whether the Plaintiffs' claim under RCRA **was** or **could have been** litigated in the Ohio court proceedings. The Plaintiffs' claim under RCRA was not litigated in the state court proceedings; indeed, such a claim was not asserted therein. In addition, the Plaintiffs argue that their RCRA claim could not have been litigated in an Ohio court, because § 6972(a) invests federal courts with exclusive jurisdiction to hear citizens suits under that statute. Certainly, if federal courts have exclusive jurisdiction over citizens' suits under § 6972(a), and, therefore, state courts cannot exercise jurisdiction over such claims, then the Plaintiffs could not have brought their claim under RCRA in the Montgomery County Court of Common Pleas. However, if state courts have concurrent jurisdiction over such claims, then nothing would have prevented the Plaintiffs from asserting that claim in state court. Accordingly, this Court turns to the question of whether federal courts have exclusive or concurrent jurisdiction to entertain citizen suits under § 6972(a).

In **Holmes Fin Associates v. Resolution Trust Corp.**, 33 F.3d 561 (6th Cir. 1994), the Sixth Circuit reviewed the principles which must be applied to determine whether federal

courts have exclusive jurisdiction over a particular federal, statutory claim or whether that claim can be pursued in state court as well:

> The Supreme Court has held that "under our system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." **Tafflin v. Levitt**, 492 U.S. 455, 458, 107 L.Ed2d 887, 110 S.Ct. 792 (1990). Accordingly, "state courts have inherent authority, and are presumptively competent, to adjudicate claims arising under the law of the United States." **Id.** It is axiomatic, however, that Congress has the power to preclude state court jurisdiction over federal claims if it so chooses. **Gulf Offshore Co. v. Mobile Oil Corp.**, 453 U.S. 473, 477-78, 69 L.Ed2d 784, 101 S.Ct. 2870 (1981).

The **Holmes** court concluded that "to overcome the 'presumptive competence' of state courts to hear and determine cases arising under federal law, the [Supreme] Court held that Congress must 'affirmatively divest' the state courts of that jurisdiction and must do so in the text of the statute." 33 F.3d at 565 (footnote omitted)(citing omitted)(citing **Yellow Freight System, Inc. v. Donnelly**, 494 U.S. 820, 108 L.Ed.2d 834, 110 S.Ct. 1566 (1990)).[6]

The statute in question, § 6972(a), provides that "any action under paragraph (a)(1) of this subsection **shall** be brought in a district court for the district in which the alleged violation occurred or the alleged endangerment may occur." (emphasis added). In

Middlesex County Bd. of Chosen Freeholders v. New Jersey, 645 F. Supp. 715, 719 (D.N.J. 1986), the only case to address the question, the court noted that the word "shall" is used in § 6972(a), a word which is construed to be mandatory rather than discretionary, and concluded that, as a consequence, federal courts have exclusive jurisdiction over citizen suits under § 6972(a). This Court does not agree with the analysis of the District Court in **Middlesex County**. In **Holmes**, the Sixth Circuit noted that "Congress is well versed in the intricacies of concurrent and exclusive federal court jurisdiction and the need for an explicit withdrawal of concurrent jurisdiction." 33 F.3d at 565. Indeed, when Congress wants to divest state courts of such jurisdiction, it has shown that it is quite capable of using explicit language necessary to accomplish that task. **See e.g.**, 29 U.S.C. § 1132(e)(1) (explicitly granting "exclusive jurisdiction" to District Courts for most actions arising under ERISA, while explicitly preserving concurrent, state court jurisdiction over ERISA actions under § 1132(a)(1)(B));.42 U.S.C. § 9613(e)(providing that District Courts "shall have exclusive original jurisdiction" over actions under CERCLA). In § 6972(a), Congress did not say that federal courts shall have "exclusive jurisdiction" over claims brought under it, nor did Congress use a phrase similar to "exclusive". However, § 6972(a) does contain the word "shall," which is interpreted as mandatory. Assuming for sake of argument that the use of the word "shall," which is sufficient to overcome the presumption of concurrent jurisdiction, the portion of that statute which uses "shall" can be just as readily be interpreted as a specific venue provision as it can be interpreted as resolving the question of which District Court a claim

under the § 6972(a) must be asserted, as opposed to divesting state courts of their presumed concurrent jurisdiction. A construction of § 6972(a) as a specific venue provision, superseding for RCRA purposes the general venue statute, is buttressed by the fact that under the general venue statute, 28 U.S.C. § 1391, an action under RCRA could be brought against a corporation in any district in which such a defendant is subject to personal jurisdiction, rather than only in the district in which the alleged violation occurred or the alleged endangerment may occur.

In sum, the Sixth Circuit has said that "concurrent jurisdiction always exists under the Supremacy Clause until affirmatively and expressly revoked by federal law. **Holmes**, 33 F.3d at 565 n. 4. When it enacted § 6972(a), Congress did not state that federal courts shall have exclusive jurisdiction over citizens suits under that statute and, therefore, did not affirmatively and expressly revoke concurrent jurisdiction. Moreover, the ambiguous context in which the word "shall" is used in that statute does not constitute an explicit withdrawal of the concurrent jurisdiction which state courts presumptively exercise. Therefore, this Court concludes that the Plaintiffs could have brought their RCRA claim in state court. Accordingly, the Plaintiffs' claim under that statute (the only claim they have asserted in this litigation) is barred by the doctrine of **res judicata.**[7]

Based upon the foregoing, the Court sustains the Defendant's Motion for Summary Judgment (Doc.#26), to the extent that said motion is predicated upon the argument that Plaintiffs' claim under RCRA is barred by **res judicata**. Accordingly, the Court directs that

judgment be entered in favor of the Defendant and against the Plaintiffs.[8]

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER HERBERT RICE.

UNITED STATES DISTRICT JUDGE.

DISPOSITION

Defendant's Motion for Summary Judgment (Doc.#26) overruled in part and sustained in part.
Judgment entered in favor of Defendant and against Plaintiffs.

OPINION FOOTNOTES

1 In a Decision filed on March 20, 1996, the Court overruled the Plaintiffs' Motion for Summary Judgment. **See** Doc. #39.

2 If such a motion were filed, the Plaintiffs would have a difficult time convincing the court that leave to amend should be granted. In **Meghrig v. KFC Western, Inc.**, 134 L.Ed.2d 121, 116 S.Ct. 1251 (1996), a unanimous Supreme Court concluded that RCRA does not authorize an award of restitution for past cleanup costs. In its Motion for Summary Judgment (Doc. #26), the Defendant relied upon **Furrer v. Brown**, 62 F.3d 1092 (8th Cir. 1995), a case in which the Eighth Circuit concluded, as did the Supreme Court in **Meghrig**, that damages in the form of restitution cannot be

recovered under RCRA. The Defendant filed its motion before the Supreme Court decided **Meghrig**.

3 Unlike restitution, the Plaintiffs' Complaint (Doc. #1) does contain a request for civil penalties.

4 The trial court had granted the Plaintiffs' request for specific performance of a contract between Defendant and them and had ordered the Defendant to clean up the property in question within one year. The Montgomery County Court of Appeals eliminated the one-year obligation and substituted the requirement that the Defendant proceed in an expeditious manner.

5 In this litigation, the Plaintiffs request that the Court order the Defendant to take actions which are necessary to remedy the situation on the property and that civil penalties be imposed upon the Defendant. As is noted above, the state court has ordered the Defendant to clean up the property. In this litigation, this Court could only order the Defendant to take such action as is necessary to prevent an imminent and substantial endangerment to health and the environment. **See** 42 U.S.C. § 6972(a). The state court's order, on the other hand, requires the Defendant to take remedial action regardless of whether the hazardous substances on the property pose such an endangerment. While that order may require the Defendant to act in the absence of such an endangerment, it is not conceivable that the Defendant could clean up the property and, thus, comply with the state court's order while the hazardous substances remained on it and constituted such an endangerment. Therefore, the state court's order that the property be remediated is at least as favorable to the Plaintiffs as any

order they could obtain in this litigation. In addition, any civil penalties which this Court would impose upon the Defendant would be paid to the United States rather than to the Plaintiffs.

6 In a footnote to the above quoted passage, the **Holmes** court stressed the strength of the presumption that state courts could decide claims predicated upon federal law.

> The [Supreme] Court has twice made clear that this "presumption" is not just an evidentiary starting point in determining Congress' intent. Rather, it refers to the fact that concurrent jurisdiction always exists under the Supremacy Clause until affirmatively and expressly revoked by federal law. **See Howlett v. Rose**, 496 U.S. 356, 370 n. 17, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990)(citing **Minneapolis & St. Louis R. Co. v. Bombolis**, 241 U.S. 211, 222, 60 L.Ed 961, 36 S.Ct. 595 (1918)).

33 F.3d at 565 n. 4.

7 Since the Court has concluded that the Plaintiffs' claim is barred by **res judicata**, it is not necessary to address the Defendant's argument that said claim is also barred by the doctrine of primary jurisdiction. The Court does note such such an argument has not received a favorable reception with other courts. **See e.g., Coalition for Health Concern v. LWD, Inc.**, 834 F. Supp. 953 (W.D.Ky. 1993).

8 In its Motion for Summary Judgment (Doc. #26), the Defendant requests that this Court award it the costs of this litigation, including reasonable attorney's fees. Section 6972(e) authorizes the award of costs,

including reasonable attorney's fees, to the prevailing party in a citizen's suit under RCRA, "whenever the court determines such an award is appropriate." **See also** Rule 54(d)(1) of the Federal Rules of Civil Procedure (costs other than attorney's fees). If the Defendant deems an award of attorney's fees to be appropriate in this case, it may file an application for same, accompanied by a detailed listing of hours and costs expended, within 30 days of the entry of this Decision. An application for an award of attorney's fees is traditionally treated as a post-judgment matter. **See While v. New Hampshire Dept. of Employment Sec.**, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). **See also** Rule 54(d)92)(B)(application for award of attorney's fees must be filed within 14 days of entry of judgment, unless court orders otherwise).

UNITED STATES DISRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, DAYTON

Donald P. Davis and Maxine Elaine Davis,	:	Filed: U.S. District Court
Plaintiffs,	:	August 27, 1996
v.	:	Case No. 93-00408
Sun Oil Company,	:	JUDGMENT ENTRY
Defendant.	:	

It is ORDERED and ADJUDGED that summary judgment is granted in favor of defendant and against plaintiffs.

KENNETH MURPHY
CLERK OF COURTS

By/s/_____
Deputy Clerk

42 U.S.C. SECTION 6972 CITIZEN SUITS

(a) **In general.** Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the constitution, and transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. Any action under paragraph 9a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without

regard to the amount in controversy or citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (a)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g) [42 USC § 6928(a) and (g)].

(b) **Actions prohibited.** (1) No action may be commenced under subsection (a)(1)(A) of this section --

(A) prior to 60 days after the plaintiff has given notice of the violation to --

(i) the Administrator;

(ii) the state in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [42 USC § 6921 et seq.]; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order. In any action under subsection (a)(1)(A) in a court of the United States, any person may intervene as

a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to --

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B),

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment --

(i) has commenced and is diligently prosecuting an action under section 7003 of this Act [42 USC § 6973] or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1080 [42 USC § 9606];

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 USC § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability

Act of 1980 [42 USC § 9604] and is diligently proceeding with a remedial action under that Act; or

(iv) has obtained a court order (including consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [1980], or section 7003 of this Act [42 USC § 6973] pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the state, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment --

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaged in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study and under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act.

(D) No action may be commenced under subsection (a)(1)(B) by any person (other than a state or local government) with respect to the citing of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the state shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) **Notice.** No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this Act may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) **Intervention.** In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) **Costs.** The court, in issuing any final order in any action brought pursuant to this

section or section 7006, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) **Other rights preserved.** Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or state agency).

(g) **Transporters.** A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

(Oct. 20, 1965, P.L89-272, Title II, Subtitle G, 7002, as added; Oct. 21, 1976, P.L94-580, section 2, 90 Stat. 2825; Nov. 8, 1978, P.L95-609, section 7(p), 92 Stat. 3083; Nov. 8, 1984, P.L98-616, Title IV, section 401, 98 Stat. 3268.)